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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

DARLENE BONANNO, an Incompetent Person, etc., Plaintiff and Respondent, v. CENTRAL CONTRA COSTA TRANSIT AUTHORITY, Defendant and Appellant.	A087846 (Contra Costa County Super. Ct. No. C94-00510)
DARLENE BONANNO, an Incompetent Person, etc., Plaintiff and Appellant, v. CENTRAL CONTRA COSTA TRANSIT AUTHORITY, Defendant and Respondent.	A088589

In November 1993 Darlene Bonanno (Bonanno) sustained serious injuries when struck by a motor vehicle as she crossed Pacheco Boulevard in Martinez. This is the third appellate chapter in litigation that commenced seven years ago. It is the second time that we have been called upon to address issues concerning whether maintenance of a bus stop at a particular location constituted a dangerous condition of public property, and whether Central Contra Costa Transit Authority (CCCTA) bore any liability as a result.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II.A.5, II.A.6, II.B and II.C.

We conclude that the jury verdict in favor of Bonanno is valid and will stand. We further conclude that posttrial orders taxing costs and reducing the judgment for collateral source payments will stand.

I. FACTUAL BACKGROUND

A. Historical Conditions

Prior to 1982 the AC Transit District operated the bus routes in central Contra Costa County (County). CCCTA assumed those services in 1982. At that time there was a bus stop located at DeNormandie Way and Pacheco Boulevard, on the north side of Pacheco. In the early 1980's residents in the neighborhood of that intersection made it known to County officials that they were having difficulty crossing Pacheco to get to the bus stop. Thereafter the County installed a crosswalk at the intersection.

However, the crosswalk did not solve the difficulty pedestrians faced in finding adequate gaps in traffic during the morning commute. Morning commute traffic on Pacheco was heavy and traffic in general increased 4 to 5 percent per year on major county arterials. Drivers were relatively inattentive and the speed limit was generally disregarded. Rear-end and fender-bender accidents occurred at DeNormandie and other intersections along Pacheco.

The DeNormandie crosswalk was not frequently used. The drivers of the two cars involved in the Bonanno accident regularly commuted on Pacheco but were unfamiliar with the crosswalk as well as the connecting bus stop. CCCTA's own representative did not remember seeing the bus stop when he drove up and down Pacheco.

B. Chittock Accident

Kimberly Chittock lived at 7 Robinsdale Road in Martinez. Around 7:30 a.m. on February 25, 1986, she was on her way to catch the bus to school. There was a tremendous flow of traffic. In the past she had tried to cross Pacheco in the crosswalk but none of the cars would stop. That morning she was struck by a car while jogging across Pacheco mid-block to get to the DeNormandie bus stop.

The Chittock family filed a claim against CCCTA complaining about the location of the DeNormandie bus stop. CCCTA denied the claim.

C. Student Complaints; Stoplight at Morello Avenue

Morello Avenue was one block west of DeNormandie. The year after Chittock's accident, during the first quarter of 1987, 15 students complained to CCCTA that it was too dangerous to cross at Morello Avenue and Pacheco to get to the DeNormandie bus stop.

Meanwhile, the County installed four traffic signal lights at Morello and Pacheco, as well as north-south crosswalks across Pacheco. The stoplights, equipped with pedestrian push buttons, were activated in July 1987. After the lights were installed, CCCTA did not move its bus stop from DeNormandie to Morello.

Although pedestrians could now cross Pacheco safely, the route to the bus stop along the north shoulder of Pacheco was unnecessarily hazardous. The shoulder was relatively narrow, with gravel and dirt adjacent to the paved portion which could be muddy. Additionally, the area was frequently occupied by large parked trucks and there was one portion where the drainage swale had eroded to within five and a half feet of the edge line. At one point the north shoulder dropped off into a ravine, requiring pedestrians to walk outside the fog line.

Traffic engineer Dr. Thomas Schultz was deposed in the Chittock case in 1991. Questioned about his deposition in the current trial, he indicated it was his opinion that pedestrians trying to cross Pacheco during the morning commute to get to the DeNormandie bus stop could not find safe gaps in traffic without a signal. Further, as a matter of bus patron safety, the DeNormandie bus stop should be moved to Morello.

The bus stop was not moved.

D. Bonanno's Accident

Bonanno lives with members of her family on Robinsdale Road, next door to Kimberley Chittock. She is a mildly retarded woman who, at the time of the accident, used public transportation, including CCCTA, to "get around."

On November 16, 1993, around 7:15 a.m., Bonanno left Robinsdale Road and proceeded to Pacheco at the DeNormandie intersection. It was rush hour; cars were passing every two to three seconds and it would have taken her at least 12 to 13 seconds to cross on foot. She waited on the curb for several minutes for a break in traffic so she could get to the bus stop.

An eastbound vehicle came along driven by Jennifer Kimberly. She saw Bonanno standing on the curb, and stopped to let her cross. Kimberly waited, then waved for Bonanno to move. Bonanno kept checking the traffic; Kimberly waved to her again.

At the same time Paul Christie was driving westbound on Pacheco. He had seen and been involved in some "close calls" in the area. Christie spotted Bonanno waiting to cross and stopped to block traffic for her. A truck went around him on the shoulder to the right.

Meanwhile, Jeremy McLain was proceeding eastbound on Pacheco on his way to work. He was having difficulty seeing out of the windshield because of the foggy condition; he bent down to peer out the lower section.

Bonanno had stepped out into the intersection. As she walked in front of Kimberly's car, along came McLain and rear-ended into Kimberly's car, causing it to thrust forward and hit Bonanno. She flew up in the air and fell straight back down.

Bonanno initially lapsed into a coma. She eventually underwent surgery to straighten out her foot.

E. Procedural History

Bonanno filed a complaint in 1994, by and through her guardian ad litem. Among others she sued CCCTA, the County, McLain and Kaiser Foundation Hospitals and related entities (collectively Kaiser). Kaiser Hospital had treated Bonanno after the accident. The non-Kaiser parties cross-complained against Kaiser. Litigation ensued as to whether cross-complainants were required to arbitrate their cross-claims under the arbitration agreement between Bonanno and Kaiser. We

concluded that they did not. (*County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237, 239-240.)

Thereafter the trial proceeded. This time CCCTA moved successfully for nonsuit at the conclusion of Bonanno's opening statement. We reversed the judgment of nonsuit in an unpublished opinion. (*Bonanno v. Central Contra Costa Transit Authority* (Apr. 7, 1998, A078592).) The other defendants settled and in 1999 Bonanno tried her case against CCCTA alone. The jury returned its verdict in her favor, finding McLain 88 percent liable and CCCTA 1 percent liable, with the remaining liability assigned 1 percent to the County and 10 percent to Kaiser Hospital.

CCCTA moved for a new trial and for judgment notwithstanding the verdict; both motions failed. CCCTA appealed from the judgment (No. A087846) and Bonanno appealed from posttrial orders concerning costs and damages (No. A088589). We have consolidated the appeals for all purposes.

II. DISCUSSION

A. Liability for Dangerous Condition of Public Property

1. General Principles

Bonanno's theory of liability against CCCTA was that placement and maintenance of the bus stop near the DeNormandie-Pacheco intersection was a "dangerous condition" within the meaning of Government Code[1] section 830 that operated as a concurring cause of her injury.

As a general matter, a public entity such as CCCTA is "liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and [that]: [¶] . . . [¶] (b) [t]he public entity had actual or constructive notice of the dangerous

[1] Unless otherwise indicated, all statutory references are to the Government Code.

condition under Section 835.2 a sufficient time prior to injury to have taken measures to protect against the dangerous condition." (§ 835.)

Thus, to establish liability under section 835 plaintiff must prove: (1) the public property was in a dangerous condition when the injury occurred; (2) the dangerous condition proximately caused the injury; (3) the injury was reasonably foreseeable as a consequence of the condition; and (4) the public entity had constructive notice of the dangerous condition in sufficient time to have reasonably taken steps to protect against it.

A "dangerous condition" is "a condition of property that creates a substantial . . . risk of injury when such property or adjacent property is used with due care" in a "reasonably foreseeable" manner. (§ 830, subd. (a).) "Adjacent property" refers to the area "exposed to the risk created by a dangerous condition of the public property. For example, the hazard created by a condition of public property may not be a hazard to persons using the public property itself, but may be a hazard . . . to those using other property. . . . [¶] . . . A public entity may be liable only for dangerous conditions of its own property. But its own property may be considered dangerous if it creates a substantial risk of injury to . . . persons on adjacent property; and its own property may be considered dangerous if a condition on the adjacent property exposes those using the public property to a substantial risk of injury." (Cal. Law Revision Com. com., 32 West's Ann. Gov. Code (1995 ed.) foll. § 830, p. 299.)

Finally, a dangerous condition may exist by virtue of the *location* of the public improvement. (See *Warden v. City of Los Angeles* (1975) 13 Cal.3d 297, 300 [submerged pipe near surface in recreational waters is a dangerous condition]; Van Alstyne et al., 2 Cal. Government Tort Liability Practice (Cont.Ed.Bar 4th ed. 1999 & 2001 supp.) § 12.18(2), pp. 769-770 (Van Alstyne).)

2. Maintenance of the Bus Stop at the DeNormandie Location Constituted a Dangerous Condition

Here, Bonanno went to the DeNormandie-Pacheco intersection during the morning rush hour and proceeded into the unprotected crosswalk because of the

location of the CCCTA bus stop. She had no other purpose to be there other than to reach the bus stop.

During the morning commute, traffic was heavy and fast and drivers were inattentive. Pedestrians had difficulty finding gaps in traffic to cross at the DeNormandie-Pacheco intersection; the wait was 5 to 10 minutes. As a general matter under these conditions pedestrians start out looking for a long gap, but will eventually accept a shorter gap, then probably approach from the curb to indicate they want to cross. Bonanno herself waited on the curb for a gap in traffic; motorists Kimberly (eastbound) and Christie (westbound) stopped to facilitate her crossing, but the gap was still insufficient. The drivers behind them did not anticipate stopping at DeNormandie and either drove into or around the stopped vehicles.

The DeNormandie crosswalk was located just a block away from the Morello intersection, which itself was equipped with traffic lights and pedestrian-activated crossing signals. Several regular commuters proceeding eastbound on Pacheco from Morello to DeNormandie, including the drivers involved in the accident, testified that they were unaware of the DeNormandie crosswalk and/or the bus stop. McLain testified he did not anticipate stopping there so soon after the Morello intersection.

The continued maintenance of this particular bus stop at this particular location constituted a dangerous condition in light of all the above circumstances for the very reason that it beckoned pedestrian bus patrons to cross, and compelled cars to stop, at the feeder crosswalk without attendant traffic lights or pedestrian-activated signals.

3. CCCTA's Counterarguments are Unavailing

CCCTA floats a slew of arguments to pick away at Bonanno's dangerous condition theory of liability. None have merit.

a. This Case Is Not About a Sign

First, CCCTA casts the theory as asserting that the dangerous condition was the CCCTA sign and pole, neither of which was defective. This is not a case about a sign. The theory of liability is that the maintenance of the bus stop *at that location*

created a hazard with respect to pedestrian bus patrons using the adjacent crosswalk in a reasonably foreseeable manner and with due care. While a public entity is not liable for dangerous conditions on adjacent property, by definition its *own* property may be dangerous if it creates a substantial risk of injury as to persons using adjacent property. (§ 830, subd. (a); Cal. Law Revision Com. com., 32 West's Ann. Gov. Code, *supra,* foll. § 830, p. 299.)

Similarly, CCCTA contends that since it did not own or control the sidewalk, the street, the crosswalk or the shoulder where the sign was located, it cannot be held responsible for a dangerous condition of property. Again, the *location* of the bus stop was within CCCTA's control, and it was this location which increased the risk of injury when pedestrian-patrons proceeded with due care through adjacent property towards the bus stop. *Holmes v. City of Oakland* (1968) 260 Cal.App.2d 378 supports this point. There a six-year-old child was on his way home from school when a train struck him, severing both legs. The reviewing court held that the plaintiff could pursue the city on a dangerous condition theory even though the city did not own or control the railroad right of way. It reasoned that the portion of the city street running along the right of way was dangerous *because a condition on the adjacent right of way exposed those using the public street to a substantial risk of injury*. (*Id*. at pp. 389-392.)

b. McLain's Tortious Behavior Does Not Negate CCCTA's Liability

CCCTA also asserts that it cannot be liable unless those who foreseeably use the property or adjacent property do so with due care. McLain was negligent and thus CCCTA cannot be responsible for failing to take precautions to protect against him, so the argument goes. Again, this was not Bonanno's theory. The actor in this section 835 scenario is Bonanno, who was using the adjacent property with due care. Her theory was that the ongoing maintenance of the bus stop allowed the accident to happen.

Nonetheless CCCTA persists that a motorist's failure to use due care negates any liability for a dangerous condition of adjacent property, citing *Lompoc Unified*

School Dist. v. Superior Court (1993) 20 Cal.App.4th 1688, 1697. There plaintiff was injured by a motorist who had been distracted by public property, namely a football field [with game in progress] which used to be shielded by a hedge doubling as a distraction barrier. Plaintiff argued that by trimming the hedge the school district created a dangerous condition. (*Id*. at p. 1696.) This is not a case where a *negligent motorist* was distracted by public property. Rather, this case is about the location of a public bus stop which beckoned a *prudent pedestrian* to cross a busy street in an unprotected crosswalk and under conditions that posed a substantial risk of harm to pedestrian patrons.

Similarly, relying on *Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, CCCTA urges that it cannot be charged with foreseeing McLain's reckless behavior, and therefore it was entitled to judgment as a matter of law. In *Chowdhury*, traffic signals were inoperative in all directions due to a power outage and pedestal stop signs had not yet been erected at the intersection in question. A man was killed when another driver failed to stop before proceeding through the intersection. The reviewing court held as a matter of law that an obviously inoperative traffic signal during a power outage does not amount to a dangerous condition. (*Id.* at p. 1194.) Moreover, once the signals failed, the city could reasonably foresee that drivers using due care would obey the Vehicle Code, which effectively transforms an inoperative signal light into a stop sign. On the other hand, the city could not be charged with foreseeing that a motorist would recklessly disobey traffic laws and speed through the intersection. (*Id*. at pp. 1195-1196.)

Unlike *Chowdhury*, here we have a dangerous condition. And to the extent, if any, that *Chowdhury* can be read to suggest that a third party's tortious conduct negates the existence of a dangerous condition, it is wrong. (See, e.g., *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 812; *Matthews v. State of California ex rel. Dept. of Transportation* (1978) 82 Cal.App.3d 116, 121.) A public entity may be liable for injuries caused by a combination of the dangerous

condition of its property and the wrongful acts of third parties. (*Slapin v. Los Angeles International Airport* (1976) 65 Cal.App.3d 484, 490; see part II.A.4, *post*.)

c. The Risk of Danger Need Not Be to All Users

Next, CCCTA maintains that the dangerous condition must increase the risk of injury to pedestrians in general, not just prospective bus patrons. CCCTA is correct that liability cannot be premised on the individual characteristics of plaintiff. (*Schonfeldt v. State of Californ*ia (1998) 61 Cal.App.4th 1462, 1466 [whether a condition creates a substantial risk of harm depends on how the general public, exercising due care, would use the property. Plaintiff's particular characteristic (there, teenager with attention deficit hyperactivity disorder) does not alter the objective standard].) However, the operative characteristic here—pedestrian bus patron—is not an individual characteristic. Pedestrian bus patrons are a subset of the general public using the crosswalk in question. There is no legal requirement that the dangerous condition must create a risk to *all* users of adjacent property.

d. CCCTA Has Control of the Location and Could Remedy the Condition

CCCTA also argues that it did not have authority to remedy the dangerous conditions pedestrians faced in crossing Pacheco Boulevard. To reiterate, the premise here is that CCCTA had control over the location of the bus stop, which it maintained with constructive knowledge of its dangerous condition. The requisite control exists when the public entity has the power to prevent, remedy or guard against the dangerous condition. (*Low v. City of Sacramento* (1970) 7 Cal.App.3d 826, 834.) CCCTA and the County had joint control over the location and removal of bus stops. That power and control is joint rather than unique does not annihilate a public entity's responsibility for dangerous conditions. (See *ibid*.)

In a similar vein CCCTA also proposes that it has no liability because private property owners are not liable for injuries occurring on adjacent public property over which they have no ownership or control, where the only "danger" is their property's proximity to the public property. For example, CCCTA refers us to *Seaber v. Hotel*

Del Coronado (1991) 1 Cal.App.4th 481, a wrongful death action against a hotel arising out of the death of a pedestrian who was struck in a marked crosswalk adjacent to the hotel's property while proceeding from the hotel to his car. The reviewing court held that the hotel, lacking effective control over the sidewalk, could not be shackled with the duty to warn pedestrians of the dangerous risk posed by the crosswalk. (*Id*. at p. 492.)

Interestingly, in reaching this conclusion the *Seaber* court considered, but distinguished, the "elastic concept" of liability of mobile street vendors for injuries to patrons on adjacent streets. (*Seaber v. Hotel Del Coronado, supra,* 1 Cal.App.4th at p. 489.) That concept of liability has been applied to the operation of a traveling convenience business which encourages patrons to use public streets and sidewalks in predictable approach routes as a means of access. (*Schwartz v. Helms Bakery Limited* (1967) 67 Cal.2d 232.) " ' "While the street vendor cannot control traffic on the street around him he can, to a degree, control his own movements, the places where he will do business and, thus, the avenues of approach to it." ' [Citations.]" (*Seaber, supra,* at p. 490.) Similarly, the existence of the bus stop and sign attracted patrons, beckoning them to cross, thereby requiring commute traffic to stop sometimes unexpectedly during peak activity at an unprotected intersection one block away from a signalized intersection. And, while CCCTA could not control traffic, it did control the location of the bus stop and thus the danger was not simply proximity. The solution was to move or eliminate the bus stop, a remedy that imposed no undue burden on CCCTA.

4. Causation

CCCTA contends that McLain's conduct in driving with the windshield frosted over and with knowledge that there was insufficient forward vision amounted to willful misconduct that "should be deemed legally unforeseeable and a superceding cause of the accident as a matter of law." First, CCCTA offered no jury instructions on this concept. On the other hand, the court did instruct the jury on the

doctrine of concurring causes.[2] This doctrine starts from the premise that there may be multiple causes of plaintiff's injury. Where a defendant's negligence is a concurring cause, the law regards it as a legal cause regardless of the extent to which it contributes to that injury. (*Espinosa* v. *Little Co. of Mary Hospital* (1995) 31 Cal.App.4th 1304, 1317-1318.) The jury was also properly instructed that "[a] cause of injury, damage, loss or harm is something that is a substantial factor in bringing about an injury, damage, loss or harm." (BAJI No. 3.76.)

Second, driving with a fogged windshield is not extraordinary or unforeseeable. Deputy Sheriff Landis, who worked a traffic assignment on Pacheco from 1985 to 1998 about a quarter of a mile east of Morello, testified to traffic conditions in that area, including "people driving with the windows so fogged up they had virtually no visibility." As well, it is difficult to pin willfulness on McLain when it was established that he was driving below the speed limit.

CCCTA also argues that there is no substantial evidence of causation. We disagree. A defendant's conduct may be a substantial factor in bringing about an injury if it " 'has created a force or series of forces which are in continuous and active operation up to the time of the harm.' " (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 253, quoting Rest.2d Torts, § 433, subd. (b).) Here the theory is that the placement and maintenance of the bus stop near the DeNormandie intersection operated as a concurring cause of Bonanno's injury. This state of affairs operated at the moment of injury and concurred with McLain's negligence to produce Bonanno's injury. As a matter of ordinary experience, maintenance of this dangerous condition might be expected to create the very risk of

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[2] The court delivered BAJI No. 3.77 as follows: "There may be more than one cause of an injury. When negligent or wrongful conduct of two or more persons contribute concurrently as causes of an injury, the conduct of each is a cause of the injury regardless of the extent to which each contributes to the injury. A cause is concurrent if it was operative at the moment of injury and acted with another cause to produce the injury. It is no defense that the negligent conduct of a person not joined as a party was also a cause of the injury."

accident that occurred. It compelled Bonanno, as a bus patron, to cross a busy street in an unprotected sidewalk instead of using a protected crosswalk a block away. This situation in turn prompted Kimberly to stop in the middle of a busy thoroughfare to facilitate Bonanno's crossing. As a final link, McLain ran into a car that would in all likelihood otherwise not be stopped were it not for the maintenance of the dangerous condition of this particular bus stop. From McLain's and others' perspectives, the location of the unlighted crosswalk just a block down from a four-way stoplight with pedestrian-activated signals was unexpected.

5. Admission of Evidence Regarding Notice[*]

For liability for a dangerous condition of public property to attach, a plaintiff must establish either a tortious act or notice. Bonanno proceeded on a notice theory and thus had to prove that CCCTA had actual or constructive notice of the dangerous condition a sufficient time prior to injury to have taken protective measures. (§ 835, subd. (b).) Accordingly, the jury was instructed as follows: "A public entity had actual notice of a dangerous condition if its officer or employee while acting within the course and scope of authority, had notice or actual knowledge of the existence of the condition and knew or should have known of its dangerous character, which notice or knowledge the officer or employee, in good faith and in the exercise of ordinary care and diligence, ought to have communicated to the entity." (BAJI No. 11.56.)

CCCTA asserts that all evidence of notice was erroneously admitted. We disagree.

a. Chittock Accident

The trial court admitted evidence of the 1986 Chittock accident to show that CCCTA had notice of a dangerous condition. CCCTA contends the two accidents were dissimilar and thus the evidence should not have come in.

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[*] See footnote, *ante*, page 1.

Generally, where " 'circumstances are similar, and the happenings are not too remote in time, other accidents may be proved to show a defective or dangerous condition, knowledge or notice thereof . . . . [Citations.] . . .' [Citations.] 'The evidence must relate to accidents which are *similar* and which occur under *substantially the same* circumstances. [Citations.]' " (*Genrich v. State of California* (1988) 202 Cal.App.3d 221, 227-228.) However, substantial similarity is enough, because no two accidents occur in precisely the same way. Moreover, the similarity requirement may vary in strictness according to the purpose for which the evidence is introduced. If offered to show the dangerous condition of a specific object, the accident must be connected with that object; but if offered to show knowledge or notice of a dangerous condition, an accident at the broader area constituting the place may be shown. (*Id*. at p. 228.)

In *Genrich v. State of California, supra*, 202 Cal.App.3d 221, admission of expert testimony about accident statistics in a state report indicating 244 accidents occurred over a 10-year period within 1,500 feet in either direction of the subject intersection was deemed improperly admitted to prove notice. Only five of the accidents involved a pedestrian, none occurred in sidewalks and all occurred at different intersections. (*Id*. at pp. 225, 228-230.)

Here we are not talking about a statistical report. We are talking about evidence concerning *an accident* that was strikingly similar to the accident in question. Both Bonanno and Chittock left from the same point of origin, during the same morning commute time frame, and were headed to the exact same destination to catch the bus. Bonanno was crossing in the crosswalk, Chittock was crossing[3]

[3] In opposition to CCCTA's motion in limine to exclude evidence of the Chittock accident, Bonanno presented deposition testimony of two witnesses. Vincente Borja stated that he brought his van to a stop prior to the accident. Chittock had been jogging and she stopped when she got to the sidewalk. Another witness stated that he saw a movement of Borja's right hand, but could not "clearly define what it was." The court, but not the jury, had the benefit of this evidence. At trial Bonanno's expert testified on

within 250 feet of it. Chittock had tried to cross in the crosswalk before, but the cars would not stop. The court was of a mind that the fact that the accident occurred in the same vicinity, whether in or out of the crosswalk, was probative of the issue of notice. This assessment does not reflect an abuse of discretion.

b. Expert Testimony in Chittock Litigation

Bonanno's expert testified about the deposition opinion he gave in the Chittock litigation to the effect that the bus stop should be moved to the signalized intersection at Morello and Pacheco as a matter of pedestrian safety. The trial court allowed this testimony on the issue of notice to CCCTA on the theory that CCCTA's attorney would be presumed to communicate major expert opinions, but not the details. (See *Considine Company v. Shadle, Hunt & Hagar* (1986) 187 Cal.App.3d 760, 765.) The Chittock lawsuit settled, but the jury was not so informed. CCCTA now complains that evidence of the lawsuit should have been excluded on Evidence Code section 352 grounds.

First, the court did not mention the settlement to the jury because it was concerned about honoring the "very strong public policy against providing settlement information or using it against a party in any way." Second, the court carefully undertook its Evidence Code section 352 analysis. Of import was the consideration that evidence of the litigation had "considerable probative value in explaining the circumstances under which the attorney for the Transit District was put on notice that an expert witness felt this was a dangerous place."

As to prejudice to the transit district, the court was troubled that CCCTA was using the attorney-client privilege "as a sword rather than a shield." The defense asserted attorney-client privilege to block evidence of actual notice—that is, to prevent Bonanno from finding out whether counsel for CCCTA apprised management of the expert opinions in the Chittock case. That left the presumption of

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cross-examination that Chittock was "[r]unning or jogging" and "came out from in front of a stopped vehicle into the eastbound or westbound lane."

imputed knowledge by virtue of the agency relationship between counsel and management.[4] Apparently the court offered to let the defense stipulate to traffic patterns and difficulties and physical characteristics around the area, but the defense declined. Thereafter the court permitted reference to the Chittock litigation for the limited purpose of showing that the expert opined that the bus stop was a dangerous condition, and such opinion was bought to the attention of CCCTA. The burden of sanitizing the evidence was placed on the defense. Again, this decision was within the court's Evidence Code section 352 discretion.

c. Testimony of Deputy Sheriff Landis

From 1985 to 1998, Deputy Landis of the County Sheriff's Department had a traffic assignment on Pacheco during the morning commute. He observed traffic problems and conditions which became problems for pedestrians trying to cross Pacheco. During 1985 to 1986, he was assigned to assist the school crossing guard at Camino Del Sol, located about one-quarter of a mile east of Morello.

Deputy Landis also served on the Pleasant Hill City Council from 1991 to 1995 in various capacities as council member, vice-mayor and mayor. Both the County and the City of Pleasant Hill were members of the joint powers authority that formed the CCCTA. Council members were free to submit information and opinions to the CCCTA. Deputy Landis was also the city's designated alternate board member to CCCTA during that time. Prior to Bonanno's accident, Deputy Landis thought the bus stop at DeNormandie was dangerous and it would be safer if moved to Morello. He attended two meetings as an alternate, at least one of which took place prior to the present accident. However, he never disclosed his observations to the board.

Deputy Landis was a publicly elected official who was sitting as an alternate on the board and who worked for two public members of the authority: the County

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[4] Per Civil Code section 2332, "[a]s against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other."

and the City of Pleasant Hill. The court determined that when an alternate member attends a meeting, he or she is a director. On the matter of whether Deputy Landis's notice was imputed to CCCTA, the court correctly ruled that this was a question of fact under BAJI No. 11.56.[5] Accordingly, Deputy Landis could be questioned about his participation on CCCTA as an alternate member and the parties could then argue to the jury "whether the notice to Deputy Landis of the things he'd seen and observed while working as a deputy sheriff were things that he would have in the ordinary course and diligence have transmitted when he went to the meeting . . . ."

But even if, as CCCTA asserts, Deputy Landis's observations did not constitute notice to it, there was substantial independent evidence of actual and constructive notice of the same nature. CCCTA relied on its 180 operators and its patrons to pass on information concerning safety. With five trips scheduled on Pacheco prior to 8:00 a.m., there was opportunity for drivers to observe morning commute conditions. CCCTA also had notice of the Chittock claim. CCCTA's own expert testified that traffic capacity problems on Pacheco were obvious since 1987.

d. Customer Complaints

CCCTA also objects that customer complaints from 1981 to 1982 should not have been admitted into evidence, arguing that they were made to AC Transit prior to CCCTA's assumption of the bus routes, they were too old, and did not involve the DeNormandie intersection. CCCTA took over the AC Transit routes in 1982; surely one can infer that the takeover involved disclosure of complaints, safety issues and the like. It is undisputed that traffic volume increased and conditions changed on Pacheco between 1981 and the Bonanno accident in 1993. The complaints served as a baseline for the continuation of conditions in the vicinity of the accident of which

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[5] BAJI No. 11.56 reads: "A public entity had actual notice of a dangerous condition if its officer or employee while acting within the course and scope of authority, had notice or actual knowledge of the existence of the condition and knew or should have known of its dangerous character, which notice or knowledge the officer or employee, in good faith and in the exercise of ordinary care and diligence, ought to have communicated to the entity."

CCCTA should have been aware, and upon which Bonanno's expert was entitled to rely.

e. New Bus Stop

CCCTA claimed that installation of a bus stop at Morello was not feasible. The trial court warned that if CCCTA proceeded down that path, it would permit Bonanno to demonstrate that CCCTA had, indeed, installed a bus stop at the Morello intersection. CCCTA offered evidence of obstacles to moving the bus stop. Bonanno in turn put on evidence of the newly installed bus stop. CCCTA's traffic engineer admitted that with the installation they had obviously "solved the problem." The transit district went on to offer evidence of how circumstances had changed at the intersection, thus changing the feasibility analysis.

The court instructed the jury that it was allowing evidence that a new bus stop had been established near the Morello intersection after the accident on the feasibility issue, not for purposes of proving culpability for a dangerous condition.

Comes CCCTA now to complain that this evidence was irrelevant and prejudicial. CCCTA is trying to have its cake and eat it too. The transit authority made the decision to counter Bonanno's theory that the proper location for the bus stop was near the Morello rather than the DeNormandie intersection with a barrage of evidence showing the obstacles to that approach. Surely the eventual installation of the Morello stop was highly probative of the feasibility issue and CCCTA loses its prejudice argument. It was for the fact finder to make the feasibility determination, taking into account all the evidence, including later improvements to the Morello Avenue area which CCCTA claimed were dispositive of its ability to add the stop after Bonanno's accident.

6. Protective Measures[*]

When a plaintiff relies on notice to establish liability, evidence must be offered to show notice was received "a sufficient time prior to the injury to have

[*] See footnote, *ante*, page 1.

taken measures to protect against the dangerous condition." (§ 835, subd. (b).) CCCTA contends inquiry as to whether a public entity "*should be regarded as having a duty to take protective measures"* is a legal question that should have been decided in its favor in this case. (Italics added.) It is CCCTA's responsibility to show affirmative error. It has pointed to no motion or request for a ruling on such a matter, let alone any judicial determination. Moreover, the cases discussing whether an entity has a duty to take at least minimal protective measures are all duty-to-warn cases. (See Van Alstyne, *supra*, § 12.53, pp. 816-818.) This is not a duty-to-warn case. If, as the jury found, the location and maintenance of the stop sign constituted a dangerous condition, and if, as the jury found, CCCTA had sufficient time to remedy the situation, then as a matter of law it had a duty to safeguard against it. The burden of showing whether protective steps were taken, and whether they were adequate, was CCCTA's.

B. Joint Liability Instruction[*]

CCCTA proposed a special instruction on joint and several liability predicated on Proposition 51.[6] The court refused the instruction. CCCTA contends that in the

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[*] See footnote, *ante*, page 1.

[6] Adopted by voter initiative in 1986, Proposition 51 added sections 1431.1 and 1431.2 to the Civil Code. Section 1431.2, subdivision (a) states: "In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount."

The proposed special instruction read: "If you should find a verdict in favor of plaintiff and against defendant on the issue of dangerous condition of public property and fix damages on behalf of plaintiff, you are instructed that, under California law, the following result will apply: [¶] 1. Central Contra Costa Transit Authority will be liable for 100 percent of plaintiff's economic damages. This is the rule of joint and several liability. [¶] 2. Central Contra Costa Transit Authority will be liable for that percentage of plaintiff's noneconomic damages which you find to be the percentage of fault for the accident attributed to Central Contra Costa Transit Authority."

absence of such an instruction the jury "improperly fashioned a compromise verdict in which the jury agreed to find 1% liability against CCCTA on the false premise that CCCTA would be liable for only 1% of Ms. Bonanno's non-economic *and* economic damages."

CCCTA carries on at great length about Bonanno's "strategy" to make CCCTA jointly and severally liable for her economic damages, while conceding all along that it had minimal responsibility. As best we can tell, Bonanno's "strategy" was to make herself whole by pursuing *all* potential tortfeasors: McLain, Kaiser, the County and CCCTA. By the time this trial finally rolled around, the other defendants had settled for $801,270, which was deducted from the $2,392,300 award for economic damages.

CCCTA insinuates that failure to deliver the proposed instruction rendered the judgment contrary to public policy because the jury was likely to surmise that the transit authority's liability would mirror the 1 percent allocation of fault. CCCTA quotes from the public policy informing Proposition 51, namely that "defendants in tort actions shall be held financially liable in closer proportion to their degree of fault. To treat them differently is unfair and inequitable. [¶] . . . [Such] reforms in the liability laws in tort actions are necessary and proper to avoid catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses." (Civ. Code, § 1431.1, subd. (c).)

What is missing from CCCTA's analysis is the reality that Proposition 51 *clearly retains joint and several liability of all tortfeasors for economic damages*, irrespective of their share of fault. The jury's job is to assess fault and determine damages, not to decide who actually pays. The proposed instruction in effect would invite the jury to nullify the legal doctrine of joint and several liability. But if there remains inequity to be rooted out from our rules of liability, the solution lies with the Legislature, not the jury.

Ruling on CCCTA's posttrial motions, the court explained that there is no BAJI instruction on joint and several liability, and that to deliver such instruction

"could lead to the very conduct of which the defendant complains, a determination of what 'end result' the jury desires and then a resolution of the issues pending before it."

CCCTA submitted a posttrial declaration of Juror W. stating that several jurors indicated a belief that a 1 percent attribution of fault would render CCCTA liable for 1 percent of both economic and noneconomic damages, and speculating that this misunderstanding resulted in a "compromise" verdict. Juror declarations suggesting deliberative error in the subjective, collective mental process of the jury, namely misunderstanding, confusion and misinterpretation of the law, are not admissible to impeach the verdict. (*English v. Lin* (1994) 26 Cal.App.4th 1358, 1367; see Evid. Code, § 1150.) Here the court properly ruled that while evidence was admissible on the matter of juror beliefs, it was not admissible to determine the jury's reasoning process in fashioning an award. And as to juror beliefs, two other jurors submitted declarations flatly contradicting Juror W.'s declaration concerning statements during deliberation that CCCTA would only be responsible for paying 1 percent of damages. Reviewing the declarations as a whole, the court concluded there was insufficient showing that the jury reached an improper agreement or of juror misconduct. "The determination by a trial court of a motion for a new trial submitted on affidavits which present conflicting facts is a determination of those controverted facts in favor of the prevailing party." (*Young v. Brunicardi* (1986) 187 Cal.App.3d 1344, 1350-1351.)

Moreover, even if the contested statements concerning liability were made, they did not constitute misconduct. Misconduct exists, for example, where extraneous statements of law are made by a juror with special knowledge based on personal experience. (See *Young v. Brunicardi, supra*, 187 Cal.App.3d at p. 1351 [retired police officer sitting as juror violated court's instructions by describing his own outside experience as a police officer on a question of law, in effect erroneously instructing fellow jurors].) At most the contested statements here amounted to

speculation upon the economic effect of the verdict, not to pseudo instructing of the jury.

C. Appeal From Posttrial Orders[*]

Bonanno has appealed from posttrial orders taxing costs and reducing the judgment pursuant to section 985. Both orders will stand.

1. The Court Properly Taxed Certain Costs

Code of Civil Procedure section 1033.5 sets forth the items which may or may not be allowed as costs recoverable in a civil action. To be allowed, costs must be incurred; they must be "reasonably necessary to the conduct of the litigation"; and they must be "reasonable in amount." (Code Civ. Proc., § 1033.5, subd. (c).) Whether a cost item satisfies these requirements is a question of fact for the trial court, whose decision will be reviewed for an abuse of discretion. (See *Gibson v. Bobroff* (1996) 49 Cal.App.4th 1202, 1209.)

Bonanno sought $114,843.74 from CCCTA as a result of costs incurred in prosecuting her case over the course of five years. CCCTA moved to tax certain costs, including expert witness fees, and witness and jury fees prior to the 1999 trial. The trial court requested that Bonanno provide more detail including whether particular cost items were incurred before or after other defendants were dismissed from the case. Evidently Bonanno established July 3, 1997 as the date she ultimately settled with all parties except CCCTA. Ultimately the court taxed certain cost items to which Bonanno now objects.

a. Jury and Witness Fees

First, Bonanno contends the court was wrong to cut out jury fees paid prior to 1999 and witness fees incurred in the first two, aborted trials. The court impliedly determined that these fees were not reasonably necessary to prosecute the case *against CCCTA*. Bonanno began prosecuting this case against four defendants. She has not convinced us that the trial court abused its discretion in taxing these costs.

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[*] See footnote, *ante*, page 1.

b. Expert Fees

Expert fees not ordered by the court are allowed "when expressly authorized by law." (Code Civ. Proc., § 1033.5, subd. (b)(1).) Here the trial court acknowledged that the parties appeared "to agree that section 998 has been brought into play by Plaintiff's rejected offer." Accordingly, it exercised its discretion pursuant to Code of Civil Procedure section 998[7] to award cost reimbursement in the amount of $15,000 for three experts,[8] as against the requested $61,105.27 for 16 experts, most of whom did not testify at trial. The court undertook a complete and full examination of the issue, expressly taking into account "the percentage of fault determined, the respective strengths and weaknesses of the competing arguments regarding legal issues, the cost of pursing the matter and the types of testimony offered by each expert witness."

Bonanno argues the amount is arbitrary. To the contrary, the court offered a thorough and thoughtful explanation for the award, which was well within its discretion.

c. Exhibit Costs

The court reduced exhibit costs from $9,589.12 to $1,500. Models, exhibit blowups and photocopies "may be allowed if they were reasonably helpful to aid the trier of fact." (Code Civ. Proc., § 1033.5, subd. (a)(12).) The requested costs were incurred prior to July 3, 1997, at which time Bonanno was prosecuting her action against other defendants as well. She settled with those parties. The reduction was not improper.

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[7] This statute provides that when plaintiff's offer is rejected and defendant fails to obtain a more favorable judgment, the court, in its discretion, "may require the defendant to pay a reasonable sum to cover costs of the services of expert witnesses . . . actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by plaintiff . . . ." (Code Civ. Proc., § 998, subd. (d).)

[8] The combined fees for the three experts totaled $45,195.81.

2. The Trial Court Properly Reduced the Judgment Pursuant to Section 985

After trial CCCTA moved for a reduction of Bonanno's award, pursuant to section 985, subdivision (b), which provides in part as follows: "[A]fter a verdict has been returned against a public entity that includes damages for which payment from a collateral source listed below has already been paid or is obligated to be paid for services or benefits that were provided prior to the commencement of trial, . . . the defendant public entity may . . . request a posttrial hearing for a reduction of the judgment against the defendant public entity for collateral source payments paid or obligated to be paid for services or benefits that were provided prior to the commencement of trial."

The statute goes on to lay out the adjustment process in situations where the verdict includes money damages for which plaintiff has already received payment or had expenses paid by certain collateral sources. In the case of "Medi-Cal, county health care, Aid to Families with Dependent Children, Victims of Crime, or other nonfederal publicly funded sources of benefit with statutory lien rights," the court *must* order reimbursement to the provider from the judgment. (§ 985, subd. (f)(1).) Here the court awarded the Director of the California Department of Health Services, as lien claimant and real party in interest, $26,237 "in full and complete satisfaction of the Director's outstanding Medi-Cal lien."[9]

In the case of payments from "private medical programs, health maintenance organizations, state disability, unemployment insurance, private disability insurance, or other sources of compensation similar to those listed in this paragraph," the court *has discretion* to order reimbursement or to reduce the verdict by virtue of such payments. (§ 985, subd. (f)(2).) In determining what portion, if any, of such payments shall be reimbursed or used to reduce the verdict, the court is to consider "the totality of all circumstances" and such terms "as may be just." (*Ibid*.)

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9 The Director has filed a brief in this appeal urging that we affirm the order awarding payment of the Medi-Cal lien. Bonanno has not sought to overturn that order, and indeed confirms that she will pay the lien "just as soon as CCCTA pays her."

The court reduced the judgment by $20,315 for collateral source payments. Bonanno fumes that this amount includes invalid reductions from impermissible sources such as Medicare and Medi-Cal. Not so.

Neither party has bothered to do or show the math. We will:

1. $46,541 attributed to Kaiser as a collateral source payment for direct services (total charges of $85,553 minus reimbursements from Medicare totaling approximately $39,012). Kaiser is a valid collateral source under section 985, subdivision (f)(2). Further, the amount is supported by substantial evidence.[10]

2. $8,721 attributed to Kaiser as a collateral source payment representing reimbursement Kaiser provided to various entities which in turn provided medical services to Bonanno. This amount is supported by the evidence.

3. From the combined $55,262 attributed to Kaiser, the court subtracted $4,347 in premiums paid by Bonanno, as called for by section 985, subdivision (f)(3)(B). This left $50,915.

4. The court reduced this amount by 40 percent (percent of recovery allocated to attorney fees, as set forth in the contingent fee agreement), as mandated by section 985, subdivision (f)(3)(C). This left $30,549.

5. As a final reduction the court applied section 985, subdivision (i), which requires that in cases involving multiple defendants the collateral source reduction must be proportional to the percentage of the judgment actually paid by the public entity seeking reduction. With that percentage set at 66.5 percent of the economic damages assessed, the final modification brought the section 985 reduction to $20,315 [$30,549 minus $10,234 (33.5 percent of $30,549)].

III. DISPOSITION

We affirm the judgment and the postjudgment orders in their entirety.

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[10] Kaiser's Director of Administrative Service testified that Kaiser provided benefits in the amount of $86,553.50 to Bonanno. Counsel for Bonanno put on evidence that Medicare had reimbursed Kaiser entities in amounts of $29,840.55 and $10,752.16. The trial court's figures are not exact, but they are within the ballpark.

_____
Reardon, Acting P.J.

We concur:

_____
Sepulveda, J.

_____
Chiantelli, J.*

* Judge of the San Francisco Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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Trial Judge:	Honorable David Bernard Flinn
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